

**Department of Health and Department of Ecology's Proposed Approaches
Regarding Service Area, Compliance, and Consistency
June 23, 2006**

The following questions relate to RCW 90.03.386 (Section 5(2)) of the 2003 Municipal Water Law. These are responses to questions developed by the Department of Health (DOH) and Department of Ecology (Ecology).

1. What is the definition of “service area” referenced in Section 5(2)?

The service area referred to in Section 5(2) will be delineated by Municipal Water Suppliers (MWS) in Coordinated Water System Plans (CWSP), Water System Plans (WSP), Small Water System Management Programs (SWSMP), (plans) or applicable engineering documents. The MWS's service area shall include the retail service area and may also include additional areas such as other public water systems that are provided water from the MWS.

The service area will represent the MWS's water right place of use if the service area remains 1) in compliance with the terms of an approved WSP or SWSMP, and 2) the “not inconsistent” requirements of Section 5(2) are met on a continuous basis. These determinations have only been made on plans and engineering documents approved after September 9, 2003.

2. At what point will “in compliance with the terms of the WSP or SWSMP” referenced in Section 5(2) be determined and who will make that determination?

RCW 90.03.386(2) contains a performance standard for compliance determinations for a MWS seeking an authorized place of use for its water rights equivalent to its service area. Although the statute does not specify who must make such a determination, DOH is specifically identified in the statute (“the effect of the department of health's approval...”), and the performance standard is embodied in the Water Code which Ecology administers. Further, RCW 90.03.386(1) directs DOH and Ecology to develop coordinated approval procedures for water system planning documents. Therefore, both agencies have a role to play in compliance determinations, as described in question number 3.

Ecology and DOH interpret RCW 90.03.386(2) to require compliance with such a plan or program at all times in order to benefit from having an approved plan or engineering document service area as its place of use. An initial compliance determination will be made by DOH and Ecology at the time of WSP or SWSMP approval. Thereafter, DOH and Ecology will determine compliance on applicable elements (outlined in Question 3) at the following times:

- Water use efficiency annual performance reports submittals.
- Engineering document submittals.
- Changes to municipal water supply purpose water rights.
- When concerns are raised.

If a MWS is not in compliance with the terms of its WSP or SWSMP, then it does not qualify for the service-area-based place of use.

3. What elements of a WSP or SWSMP will be considered in DOH's determination of "in compliance" for the purpose of Section 5(2)?

The following elements will be considered for "in compliance" determinations:

- plan approval date is current (DOH)
- water use efficiency requirements are met(DOH)
- service area is designated (includes retail service area and area outside retail service area, if applicable) (DOH)
- Water Right Self Assessment is completed (DOH) and accurate (Ecology)
- reclaimed water is evaluated - for MWS with > 1,000 connections (Ecology & DOH)
- local governments "not inconsistent" determinations are complete for entire service area (DOH), and
- watershed plan "not inconsistent" determination is complete for expanded portions of the service area (Ecology).

4. How will "consistency" / "not inconsistent" with adopted comprehensive plans, land use plans, or development regulations, and watershed plans as it relates to Section 5(2) and Section 8 be determined?

"Not inconsistent" determinations (Section 5(2)) are only necessary if, in a plan or engineering document, a MWS requests that its water rights' place of use be expanded by having its service area supersede the place of use designated on its water rights documents, or if a MWS requests an expansion of an existing service area that earlier superseded the water rights place of use.

It is Ecology's responsibility to make the "not inconsistent" determinations for watershed planning (Chapters 90.82 and 90.54 RCW) regarding area added to the MWS's place of use. If no approved or adopted watershed plans exist, no determination is required for this element. Ecology will not solicit comments on watershed planning from interested parties during its review. Following review, Ecology will notify DOH and copy the MWS regarding its "not inconsistent" determinations for watershed planning.

It is DOH's responsibility to make the local government "not inconsistent" determinations for the entire service area in Section 5(2) and consistency determinations for the retail service area in Section 8. DOH will follow the same local government consistency process for Section 5(2) and Section 8.

Water purveyors will be responsible for completing one "consistency" / "non inconsistent" checklist that addresses comprehensive plans, land use plans or development regulations and watershed plans and obtaining signatures from appropriate local government entities. In general purveyors may complete the checklist on their own where they are unable to get documentation of "consistency" / "not inconsistent" from local government officials. The checklist shall be submitted to DOH with the draft WSP or SWSMP.

DOH will consider Ecology's watershed plan "not inconsistent" determination as part of its water system plan review process and will address the determination with the utility as appropriate. If the "not inconsistent" requirements have been met *and* DOH approves the plan or engineering document, the MWS will qualify for the service-area-based place of use. DOH will not approve a

plan if Ecology has issued an “inconsistent” determination relating to watershed planning in the form of an appealable order.

In the coming months, Ecology and DOH will develop a coordinated process (an MOU) for integrating all of the above requirements.

5. What are the effects to a MWS of failing to meet the WSP or SWSMP service area compliance or “not inconsistent” requirements found in Section 5(2)?

Ecology and DOH interpret RCW 90.03.386(2) to require continued compliance and consistency with the statute in order to qualify for the service-area-based place of use. Therefore, if a MWS fails to meet the requirements in RCW 90.03.386(2), the effect is that the MWS’s place of use would not include “any portion of the approved service area that was not previously within the place of use for the water right”, but rather would only be as identified in the most recent DOH – approved plan or engineering document if the previous plan was approved after September 9, 2003; otherwise reversion is to the original water right(s) place of use. If the inconsistency is limited to one area of the expanded place of use, only that area is no longer expanded.

Compliance and “not inconsistent” determinations will be made at the times described in the answer to question two above. If, at those times, a MWS fails to meet the qualification requirements under the statute for the service area based place of use, DOH will consider the impact on the plan or engineering document approval process. DOH may seek, as appropriate, voluntary compliance followed by escalating levels of enforcement to achieve compliance.

If, at the times described in the answer to question two above, a MWS is serving an area not covered by its water rights, and then Ecology will first seek voluntary compliance under RCW 90.03.605, which requires it to take deliberate steps to achieve compliance starting with education and technical assistance. An appealable decision would only be issued after the requirements of RCW 90.03.605 have been met. Ecology will use its enforcement authority judiciously. The goal is to achieve compliance, not to cause an official reversion of place of use with its attendant displacement of existing water uses. Also, Ecology views its jurisdiction as being narrowly limited to those elements described in number three above. A finding of inconsistency by Ecology during plan review would be conveyed to DOH and the MWS with a clear written communication that the utility is to not extend or expand service into the area having the inconsistency issue until or unless the issue is resolved. A finding of inconsistency would affect only that area and not the entire service area / place of use of the utility.

DOH and Ecology will work together to manage a transitional period until 2015 after which many MWS should have had two plans approved after September 9, 2003 and will thus not be at risk of a reversion of place of use back to the original water rights. We believe the risk of reversion by a responsible MWS is limited, especially given all the caveats noted above.

MWS that fail to meet the requirements in RCW 90.03.386(2) can regain the expanded place of use by resolving the land use, development regulation, or watershed planning conflict, or they can apply and receive a RCW 90.03.380 and RCW 90.44.100 change decision authorizing their expanded place of use.

If a MWS returns to compliance or consistency, then the agency responsible for evaluating such compliance or consistency will notify the other agency and the MWS. DOH will notify local governments that the performance standard has been met.

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